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No. 86-542

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence at trial required that the court instruct the jury on the entrapment defense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 795 F.2d 278.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1986. The petition for a writ of certiorari was filed on September 2, 1986, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c) (Count 1), racketeering conspiracy, in violation of 18 U.S.C. 1962(d) (Count 2), and two counts of attempting to possess methamphetamine with intent to distribute it,

in violation of 21 U.S.C. 846 (Counts 6 and 21). Petitioner was sentenced to concurrent terms of five years' imprisonment on Counts 1 and 2, and a five-year term of probation on Counts 6 and 21.[1]

1. The Pagans Motorcycle Club was a multistate organization that, from a least 1976 to 1982, manufactured and distributed certain controlled substances, principally phencyclidine and methamphetamine (Pet. App. 7a). Petitioner was the Pagans' national treasurer (Gov't App. 33a-34a).[2] In addition, he served as an "advisor" to local chapters of the Pagans in the Philadelphia and southern New Jersey areas (*id.* at 72a). The evidence at trial showed that, throughout the 1976-1982 period, petitioner received presents and small quantities of phencyclidine in exchange for permitting drug distribution to occur through Pagan club contacts and on Pagan club premises (Pet. 4).

In the fall of 1977, Richard Lehr, one of the Pagans' phencyclidine suppliers, asked petitioner for permission to use a middleman in selling phencyclidine to Pagan members (Gov't App. 309a-310a). Lehr indicated that Pagan members had complained about the price and quality of the drugs he was supplying, and Lehr said he believed using a single dealer would improve the distribution situation (*ibid.*). Petitioner declined to act as the middleman himself, but he allowed Lehr to make such an arrangement with Michael Grayson, another Pagan member (*id.* at 310a-313a). Thereafter, Lehr provided Grayson

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[1] Petitioner was indicted together with nine co-defendants. Two of them pleaded guilty, and the others were all convicted at trial.

[2] "Gov't App." refers to the supplemental appendix filed by the United States in the court of appeals.

with approximately 9 to 14 pounds of phencyclidine each week for distribution among the Pagans (*id.* at 313a-316a).

In January 1983, one of the Pagans' former methamphetamine suppliers, James DeGregorio, informed petitioner that he had procured all of the chemicals necessary to manufacture methamphetamine (Gov't App. 235a-236a). DeGregorio asked petitioner to alert his former Pagan customers that he would soon have methamphetamine for sale (*id.* at 236a). DeGregorio promised to give petitioner one pound of methamphetamine for assisting him (*id.* at 268a-269a). Unbeknownst to petitioner, DeGregorio was acting as an informant for federal law enforcement officers at that time (*id.* at 20a-24a).[3]

Several days later, on January 15, 1983, DeGregorio contacted petitioner again and informed him that the methamphetamine was almost ready for sale (Gov't App. 236a-237a). DeGregorio asked if petitioner had contacted any of DeGregorio's former customers (*id.* at 238a). Petitioner replied that he had tried to contact one Pagan member but had failed (*ibid.*). He said that he would continue trying to contact that member and others (*id.* at 238a-239a).

The next day, DeGregorio took 20 pounds of "look-alike" methamphetamine to a Holiday Inn in Essington, Pennsylvania (Gov't. App. 239a-243a). From there, DeGregorio telephoned petitioner and indicated that the methamphetamine was ready for sale (*id.* at 244a-245a). Petitioner stated that he had successfully contacted one

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[3] DeGregorio had been convicted in state court in September 1982 on charges of attempted murder (Gov't App. 21a). While he was in prison, federal officials contacted him and obtained his agreement to act as an informant for them (*id.* at 20a-22a). State authorities temporarily released DeGregorio so that he could work with the federal officials (*id.* at 22a-24a).

Pagan member, Charles McKnight (*id.* at 245a). Later that day, McKnight telephoned DeGregorio and informed him that he had received DeGregorio's message from petitioner and that he wanted to purchase methamphetamine (*id.* at 250a-252a). A short time later, McKnight and Michael Grayson came to the hotel (*id.* at 251a-252a, 260a-261a); each purchased a pound of the "look-alike" methamphetamine (*id.* at 260a, 273a-276a). Later that evening, they returned and purchased another two pounds of the substance (*id.* at 277a-279a).[4]

The following evening, DeGregorio met with petitioner (Gov't App. 282a-283a). At that meeting, DeGregorio gave petitioner a pound of the "look-alike" methamphetamine as payment for assisting him, and petitioner accepted it (*id.* at 290a-291a). Petitioner subsequently sold half of the pound of "look-alike" methamphetamine to Kenneth Weaver, another member of the Pagans (17 Tr. 54).[5]

In his defense, petitioner denied that he was a dealer in drugs or that he had ever conspired to distribute methamphetamine (22 Tr. 191; 23 Tr. 40). Specifically, he testified that he told DeGregorio several times that he did not want the pound of methamphetamine because he "wouldn't know what to do with it" (23 Tr. 38). Nonetheless, petitioner testified, DeGregorio left the drugs in petitioner's van (*ibid.*). Petitioner further testified that, when he gave some of the "look-alike" methamphetamine to Kenneth Weaver a few weeks later, he told Weaver that he "didn't think it was anything" and that he "knew it was garbage, not what it was supposed to be" (*id.* at 39-40).

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[4] Petitioner's conduct in arranging for the sale of the "look-alike" methamphetamine to McKnight and Grayson formed the basis for the charge in Count 6 of the indictment.

[5] Petitioner's possession of a pound of the "look-alike" methamphetamine formed the basis for the charge in Count 21 of the indictment.

At the close of his defense, petitioner requested that the court instruct the jury on the defense of entrapment. The court refused to do so, noting that petitioner had not admitted the elements of the offenses with which he was charged. Pet. 6.

2. The court of appeals affirmed (Pet. App. 1a-32a). It found petitioner's challenge to the district court's refusal to give an entrapment instruction "to be without merit and [to] require no discussion" (*id.* at 5a & n.2).

ARGUMENT

Petitioner argues (Pet. 6-9) that this Court should grant a writ of certiorari to resolve a conflict among the circuits concerning whether a defendant must admit all the elements of a charged offense before he is entitled to raise the defense of entrapment.[6] The evidence petitioner produced, however, would not entitle him to an entrapment instruction in *any* circuit. Accordingly, this case is not an appropriate vehicle for addressing the issue petitioner raises.

The courts of appeals uniformly hold that, before an entrapment instruction may be given, a defendant must "make some showing of both inducement [by the government] and lack of predisposition [by the defendant]" (*United States* v. *Nations,* 764 F.2d 1073, 1079 (5th Cir. 1985)). See also *United States* v. *Busby,* 780 F.2d 804, 806 (9th Cir. 1986); *United States* v. *Luce,* 726 F.2d 47, 49 (1st Cir. 1984); *United States* v. *Rhodes,* 713 F.2d 463, 467 (9th Cir.), cert. denied, 464 U.S. 1012 (1983); *United*

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[6] The Ninth Circuit has held that a defendant can argue both that he did not commit the unlawful acts charged against him and that, if he did, he was entrapped. See *United States* v. *Demma,* 523 F.2d 981 (1975) (en banc). Other courts of appeals have held that such inconsistent pleading is impermissible. See *United States* v. *Smith,* 629 F.2d 650 (10th Cir.), cert. denied, 449 U.S. 994 (1980); *United States* v. *Shoup,* 608 F.2d 950 (3d Cir. 1979).

States v. *Bagnell,* 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983). Thus, unless there is some evidence of "overreaching inducive conduct on the part of the government" (*United States* v. *DeVore,* 423 F.2d 1069, 1071 (4th Cir. 1970)), and an "unreadiness" on the defendant's part (*United States* v. *Annese,* 631 F.2d 1041, 1047 (1st Cir. 1980)), no circuit allows the entrapment defense to be sent to a jury. See also *United States* v. *Brooks,* 567 F.2d 134, 142 (D.C. Cir. 1977) (Robinson, J., dissenting). In this case, the evidence was insufficient on both issues.

There was no evidence at trial that the government coerced or pressured petitioner to commit the charged offenses. See *United States* v. *Luce,* 726 F.2d at 49; *United States* v. *Bagnell,* 679 F.2d at 835. Petitioner testified that DeGregorio solicited his assistance in the distribution of the "look-alike" methamphetamine. But solicitation alone does not establish "inducement" by the government; there must be some evidence of at least "mild persuasion or coercion" (*ibid.*). Petitioner did not suggest that DeGregorio pressured him to contact McKnight (see 23 Tr. 35), so there is no basis whatsoever for his entrapment claim as to the charge of aiding and abetting the attempted possession of methamphetamine on January 16. And petitioner's brief testimony about DeGregorio's conduct in giving him the pound of methamphetamine on January 18 does not suggest that DeGregorio coerced or pressured petitioner in any way. The most petitioner's testimony suggests is that DeGregorio wanted petitioner to have the methamphetamine and that petitioner said he did not want it and would not know what to do with it (23 Tr. 38). After DeGregorio had allegedly left the drug in petitioner's van, petitioner admits he maintained possession of the drug for several weeks, after which he distributed part of it to Weaver (23 Tr. 38-40). Thus, even taking petitioner's testimony as true, the evidence was insufficient to support

petitioner's claim that he was pressured by an agent of the government to commit the offenses with which he was charged.[7]

Nor did the evidence in any way support petitioner's contention that he was not predisposed to commit the crimes for which he claims he was entrapped. See *United States* v *Nations,* 764 F.2d at 1080; *United States* v. *Rhodes,* 713 F.2d at 467. On the contrary, the record contains "overwhelming evidence of his predisposition" (*ibid.*). Petitioner was a member of the drug distribution enterprise well before DeGregorio solicited his assistance in the "look-alike" methamphetamine distribution scheme: petitioner aided and abetted Lehr's distribution of phencyclidine in 1977 and, more generally, allowed the distribution of drugs through club contacts and on club premises throughout the 1976-1982 period. Furthermore, the record shows that DeGregorio had good reason to contact petitioner in 1982 and to offer him a pound of the "look-alike" methamphetamine in exchange for assisting in its distribution: petitioner had accepted presents and small quantities of drugs throughout the 1976-1982 period in exchange for facilitating the distribution of controlled substances to Pagan members. Although petitioner disputed the evidence of his drug activities in his own testimony, he made a number of damaging admissions that

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[7] Rather than supporting a defense of entrapment, petitioner's testimony appears to have been designed to support a very different defense. As to the telephone call to McKnight, petitioner testified that he did not know that DeGregorio was contacting McKnight for purposes of arranging a drug deal (see 23 Tr. 131). As to petitioner's possession of the pound of "look-alike" methamphetamine, petitioner testified that he did not initially accept the drug. Instead, he testified that DeGregorio left it for him in his van. After he discovered that he had the substance, petitioner said, he doubted that it was methamphetamine, and therefore claimed that he never had the intent to possess a controlled substance (23 Tr. 39-40).

undermined his claim that he was not predisposed to possess methamphetamines. In particular, he admitted that he had used phencyclidine regularly and that he had used methamphetamine as well (22 Tr. 192-193; 23 Tr. 78-81). He also admitted that he had held supplies of methamphetamine for DeGregorio on other occasions (22 Tr. 193). In addition, petitioner testified that DeGregorio and another drug distributor had regularly given him supplies of phencyclidine, which petitioner had on occasion distributed to others (*id.* at 204, 215-218, 220, 222; 23 Tr. 10, 84). Thus, the evidence in the record does not remotely support petitioner's contention that he was an unpredisposed victim of coercive pressure by a government agent.

Where, as here, the defendant has not met his initial evidentiary burden, he is not entitled to an instruction on the entrapment defense. See, *e.g.*, *United States* v. *Sarmiento,* 786 F.2d 665 (5th Cir. 1986). Thus, regardless of whether a defendant can properly assert inconsistent defenses in an entrapment case, petitioner has failed to establish his entitlement to an entrapment charge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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